

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 180 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN and

MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DALPATSING DUNGARSING BHATI

Versus

STATE OF GUJARAT

Appearance:

MR PB MAJMUDAR for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE R.R.JAIN and

MR.JUSTICE H.R.SHELAT

Date of decision: 08/02/96

ORAL JUDGEMENT

Being aggrieved by the judgment and order passed by the learned Addl. Principal Judge, City Sessions Court, Ahmedabad in Sessions Case No. 235/87 holding him guilty for the offence under sections 18 and 29 of the Narcotic Drugs and Psychotropic Substances Act 1985

(hereinafter referred to as the NDPS Act) and sentencing him to suffer R.I. for 15 years and a fine of Rs.1.50 lacs i/d. 5 years R.I. for the offence u/s 18 of the NDPS Act and further sentencing him to suffer 15 years R.I. and a fine of Rs. 1 lacs i/d R.I. for five years for the offence u/s 29 of the NDPS Act and further sentencing him to suffer R.I. for three months and a fine of Rs. 2500/- i/d further R.I. for one month for the offence u/s 66-A of the Bombay Prohibition Act , has preferred the aforesaid appeal before this Court.

2. Mr. C.L. Soni learned advocate for Mr. P.B.Majmudar appearing for the appellant has vehemently argued that mandatory provisions of the NDPS Act have been violated vitiating the trial and therefore, no offence shall be deemed to have been committed under any of the provisions of the said Act. Mr.Soni has taken us through the entire evidence and in particular to the oral testimony of witness no.1. Exh.7 of Himatlal Sitaram Barot, Superintendent of Customs . It is an admitted fact that the search of the premises from where the contraband drug was seized and found was carried out at 8.30 p.m., meaning thereby after the sun set and before the sun rise. It is also an admitted fact on record that no reasons are recorded by the officer carrying out the search and seizure for his belief for carrying such search after sun set and before sun rise without authorisation. Section 42(1) of the NDPS Act empowers the empowered and authorised officer to enter and search any building, conveyance or place without recording any reasons between sun rise and sun set, but the proviso deals with a situation where the search is required to be carried out between the sun set and sun rise. According to this proviso, if any such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.The proviso makes it clear that an officer has power to search any place or conveyance even after sun set and sun rise but for doing so he has to record his reasons. In this case we do not find that before carrying out the search admittedly after sun set any of the officers associated with the investigation had recorded any reasons and therefore, admittedly, mandatory proviso to section 42 of the NDPS Act has been violated. Now the question which arises for consideration is whether such provision is mandatory or directory and what

would be the effect in case of non compliance. On this point Mr. Soni has invited our attention to the decision reported in 1994(3) SCC 299 in the case of State of Punjab vs. Balbir Singh wherein the apex court in unequivocal terms has held that under section 42(1) of the NDPS Act an empowered officer on prior information has power to carry out the arrest or search without warrant between sun rise and sun set even without recording his reasons or belief. But under proviso to section 42 it is stated that such officer who carries out search and seizure after sun set and before sun rise must record his reasons as well as belief and to that extent the proviso is held to be mandatory and contravention of the same would affect the prosecution and vitiate the trial. Mr. Gehani learned advocate for the respondent no.2 has no comments to this legal position. However, he has invited our attention to sub-para 4(b) of para 25 of the judgment in the case of Balbir Singh(Supra) (page 322). In para (4-B) it is held as under:

" If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C., namely section 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial. "

We appreciate the attempt and anxiety of Mr. Gehani but these observations are of no help to the respondents for the simple reason that these observations are made in connection with the proviso to section 41(2) of the NDPS Act. Section 41 of NDPS Act deals with power to issue warrant and authorisation. According to this section, any such officer of gazetted rank having regard to the facts and circumstances of the case can authorise any officer subordinate to him as contemplated under the Act to arrest such a person or search building conveyance or place either by day or night. We entirely agree that for issue of warrant or authorisation by an empowered officer for carrying out search and seizure, no reasons are required to be assigned. But once an officer has been authorised to do this act, it is mandatory on his part to follow the procedure mentioned in section 42 of the NDPS Act and section 42 of the NDPS Act mandates that if such search is to be carried out between sun rise and sun set no reasons are required to be recorded. If the search is required to be carried out after sun set and before sun rise, he is required to record grounds of his belief. In this view of the matter the observations of the Supreme

Court, as pointed out and relied upon by Mr. Gehani do not help us.

3. Even otherwise also when there are special provisions prescribing procedure, then special provisions shall prevail over general procedure. This has been made clear by the Supreme Court in the same decision and therefore, on this ground also, we do not agree with the submissions advanced by Mr. Gehani. Mr. Gehani has invited our attention to the decision of the Supreme Court in the case of Mohinder Kumar vs. The State, Panaji-Goa reported in 1995 Cr.L.J. 2074 . But in our view the judgment helps the appellant as it has been held that proviso of sections 42 and 52 dealing with regard to steps to be taken by officer making arrest, search or seizure are mandatory and non compliance of said provision vitiates the trial and thereby the accused would be entitled to acquittal. It is needless to say that while making these observations the view taken in the case of Balbir Singh (Supra) has been followed.

4. In this background, we hold that on the face of the record, the proviso to section 42 of the NDPS Act which is , violated goes to the root of the trial which stands vitiated. As a logical result , the accused cannot be held guilty for the commission of the offence as alleged and deserves to be acquitted qua the offence under the NDPS Act.

5. The appellant has also been convicted under section 66-A of the Bombay Prohibition Act and sentenced to undergo S.I. for 3 months and a fine of Rs. 500/i/d S.I. for one month. So far as the offence u/s 66-A under Bombay the Prohibition Act, the relevant provisions applicable for carrying search, and seizure would be under Cr.P.C. i.e. general provisions. In the case of Balbir Singh(Supra) the Supreme Court has held that non compliance of the provisions of Cr.P.C. for search and seizure would not per se vitiate the trial. In this case, the sentence awarded under NDPS Act has been set aside on the ground of non-compliance of mandatory provisions, and not on merits. The mandatory provisions are contained in the Act and relate to the investigation in relation to any offence committed or apprehended to be committed under the Act and therefore, said provisions cannot be made applicable to a case falling under Bombay Prohibition Act. We have gone through the evidence and find no reason to upset the finding recorded by the learned Addl. Principal Sessions Judge in relation to the offence punishable u/s 66-A of the Bombay Prohibition Act and therefore, confirm the same.

6. In the result, the appeal is partly allowed. The conviction and sentence passed by the learned Addl.Principal Sessions Judge, City Sessions Court, Ahmedabad for the offences u/ss. 18 and 29 of the NDPS Act is quashed and set aside and the appellant is acquitted for the same. However, the conviction and sentence under section 66-A of the Bombay Prohibition Act is confirmed and the appellant is ordered to undergo the same. We are informed that the accused is in jail since last more than 8 years; whereas the sentence confirmed by us is for a period of three months only therefore, shall be deemed to have undergone the said sentence by now.

In the result, the appellant is ordered to be set at liberty forth, if not required in any other case.

Muddamal to be disposed of as per the order of the Trial Court.

for correction pl.see original.